82-1600

No.

IN THE

Supreme Court of the United States

TERM, 198

WILLIAM GIBBONS, Trustee of the Property of
CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,
Petitioner,

v.

NATIONAL STEEL SERVICE CENTER, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

I. Does federal transportation law and national transportation policy preempt the power of the Iowa State Court to assess a civil penalty in the form of liability without fault upon an interstate rail carrier hauling hazardous substances pursuant to mandatory federal requirements and in conformity with the requirements of federal and state law?

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TABLE OF CASES CITED

MISCELLANEOUS

No.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

William Gibbons, Trustee of the Property of Chicago, Rock Island and Pacific Railroad Company ("Trustee") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above case on December 2, 1982.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (Ap. A-18) is reported at 693 F. 2d 819 (1982). The opinion of the Supreme Court of Iowa certifying a question of state law to the Eighth Circuit is reported at 319 NW2d 269 (Iowa 1982). The opinion of the United States District Court for the Southern District of Iowa is unreported.

JURISDICTION

Judgment of the Court of Appeals was entered on December 2, 1982. The Trustee's Petition for Rehearing was denied on December 28, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article VI, cl. 2 of the Constitution of the United States provides:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Federal Railroad Safety Act, 45 U.S.C. § 421, provides:

> "The Congress declares that the purpose of this Act is to promote safety in all areas of railroad operations and to reduce railroad-related accidents, and to reduce deaths and injuries to persons and to reduce damages to property caused by accidents involving any carrier of hazardous materials. (Oct. 16, 1970, P.L. 91-458, Title I, § 101, 84 Stat. 971)."

Federal Railroad Safety Act, 45 U.S.C. § 434, provides:

> "The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary had adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional

or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce. (Oct. 16, 1970, P.L. 91-458, Title II, § 205, 84 Stat. 972.)

Section 1811 of the Hazardous Materials Transportation Act provides:

"(a) Except as provided in subsection (b) of this section, any requirement, of a State or political subdivision thereof, which is inconsistent with any requirement set forth in this chapter, or in a regulation issued under this chapter, is preempted.

"(b) Any requirement, of a State or political subdivision thereof, which is not consistent with any requirement set forth in this chapter, or in a regulation issued under this chapter, is not preempted if, upon the application of an appropriate State agency, the Secretary determines, in accordance with procedures to be prescribed by regulation, that such requirement (1) affords an equal or greater level of protection to the public than is afforded by the requirements of this chapter or of regulations issued under this chapter and (2) does not unreasonably burden commerce. Such requirement shall not be preempted to the extent specified in such determination by the Secretary for so long as such State or political subdivision thereof continues to administer and enforce effectively such requirement."

STATEMENT

Recent amendments to the Interstate Commerce Act and other Acts of Congress have expanded federal regulations of interstate carriers by rail and thus restricted allowable state regulation to the extent that novel questions of federal preemption law arise when the federal regulatory scheme overlaps with areas of traditional state tort law jurisdiction. This is such a case.

Broadly stated, this case involves the question of whether the pervasive federal legislation regulating railroads and railroad safety preempt state law so as to forbid a state, under the guise of tort law, from imposing a civil penalty in the form of damages on a rail carrier where an accident occurs without the carrier's fault while it is transporting hazardous material, pursuant to its federally mandated duty and in compliance with federal regulations. This is virtually a companion case to *Silkwood* v. *Kerr-McGee Corp., infra,* pending in this Court and involves what is essentially a conflict between the Eighth and Tenth Circuits on Federal preemption law.

Iowa, for the first time, seeks to impose liability without fault on an interstate rail carrier hauling dangerous cargo in performance of its mandatory statutory duty under federal law. Iowa did not impose liability in this case for the purpose of dealing with an essentially local hazard or condition, such as regulating speed of trains or rail crossing protection. Iowa instead imposed a civil penalty (in the guise of tort liability) on an interstate rail carrier activity mandated by federal law despite the fact the rail carrier did not violate any state or federal statute, regulation, or common law rule of conduct. In enlarging its field of tort liability, Iowa seeks to cast burdens on interstate rail carriers in matters not involving essential local interests and in a manner now clearly forbidden by the federal statutory and regulatory scheme. The court of Appeals for the Eighth Circuit regarded the question as one of state tort law and certified the question of

absolute liability to the Iowa Supreme Court.[1] The Iowa Court held that a carrier was absolutely liable for damage from an explosion on the railroad, even though the jury in the United States District Court had found the railroad to be free from any negligence, even under the doctrine of *res ipsa loquitur*. The Eighth Circuit then affirmed the judgment of the United States District Court which held as a matter of law that the railroad was absolutely liable. This result requires granting of certiorari by this Court for consideration of this novel and important premption question.

The Facts Of The Case

On September 1, 1975, at Des Moines, Iowa, tank cars of propane exploded on the Trustee's line of railroad. An extensive investigation by two federal agencies followed and no violations of federal law were shown. Both the track, which had been rebuilt shortly before, the cars and all equipment fully met federal standards. It was shown at the trial that federal regulations required the Trustee to accept the propane cars at the Inver Grove, Minnesota exchange point and carry them through Iowa to Missouri. Damage was caused to the property of National Steel Service Center, Inc. ("National Steel") Which was paid by its insurance company.

On June 11, 1976, the insurance company in the name of National Steel commenced this action by filing a Complaint in the United States District Court for the Southern District of Iowa. On March 17, 1980, a jury trial was held before the Hon. R. E.

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[1]Petitioner moved for certification to the Supreme Court of Iowa, as a determination that an interstate railroad is not liable, absent fault, for damages arising from carrying a hazardous substance, the majority view in this country and followed by *Restatement Torts 2d*, would have made decision of the preemption question unnecessary. The federal preemption question was, however, preserved.

Longstaff, United States Magistrate. At the conclusion of the evidence, National Steel moved for a directed verdict on the issue of liability without fault. The Trial Court reserved ruling on National Steel's motion On March 21, 1980, the issue of negligence under the doctrine of *res ipsa loquitur* and the issue of damages were submitted to the jury by special verdict. The jury found that the Trustee was *not negligent*, even under the presumption of negligence permitted under the doctrine of *res ipsa liquitur*. It found National Steel's damages to be $443,625.

On March 26, 1980, the Trustee filed a motion for directed verdict and entry of judgment for defendant, in conformity with the jury's answer to the Interrogatory finding no negligence.

The Decision of the District Court

On March 27, 1980, the Trial Court entered an Order denying the Trustee's motion for directed verdict and entering judgment in favor of National Steel on the basis of liability without fault. (Magistrate's Opinion, A. p. A-1) On March 28, 1980, the Hon. Harold Vietor, Judge of the District Court, adopted Magistrate Longstaff's Order. The Trustee appealed to the United States Court of Appeals for the Eighth Circuit. On May 22, 1981, the Eighth Circuit Court of Appeals certified the question of liability without fault under state law to the Supreme Court of Iowa. (A-18)

The Decision of the Supreme Court of Iowa

On May 19, 1982, the Supreme Court of Iowa filed its opinion, holding that under the circumstances of the case, a railroad carrier was liable without fault, a new concept in Iowa law, and rejected the *Restatement's* position and the previous common law rule that a common carrier was not liable, lacking fault, under such circumstances. (A. p. A-7)

The Decision of the Court of Appeals

On December 2, 1982, the judgment of the United States District Court, holding the Trustee liable for damages without fault arising from the explosion under state law was affirmed by the Eighth Circuit on the basis of the opinion of the Supreme Court of Iowa which did not consider the pre-emption question. (Ap. p. A-18)[2] On December 28, 1982, the Eighth Circuit overruled the Trustee's Petition for Rehearing on the Pre-emption question.

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[2] The Eighth Circuit Court's statement in refusing to consider the federal preemption question that "subsequent" to the decision of the Iowa Supreme Court The Rock Island (Trustee) filed briefs with the Circuit raising the federal preemption question and that the Circuit "implicitly decided this question against the Rock Island" when it agreed to certify the question of liability without fault to the Supreme Court is in error. In fact, the Trustee raised the federal preemption question in the Eighth Circuit prior to the certification to the State Court and clearly preserved the federal question which would have been mooted had the Iowa Court followed existing law and the *Restatement*. The Trustee, in his Reply Brief in the Circuit, stated: "However, in the factual contest of the present case, the issue of preemption need not be reached by this Court because the Iowa common law common carrier exception to liability without fault for abnormal hazardous activity is dispositive of the case". (See Table of Contents of the Trustee's Eighth Circuit Briefs, A. p. pp. A-22—A-24).

REASONS FOR GRANTING THE WRIT

I. The Court Below Erred In Holding That Federal Transportation Law And National Transportation Policies Do Not Preempt The Power Of The Iowa State Court To Assess A Civil Penalty In The Form Of Liability Without Fault Upon An Interstate Carrier Who Carried A Hazardous Cargo Pursuant To Its Federal Duty And Acted In Conformity With The Requirements Of Federal And State Law And Regulations And Without Negligence.

It is elementary that under the Supremacy Clause of the United States Constitution state laws which "interfere with, or are contrary to the laws of Congress" are invalid. *Gibbons* v. *Ogden,* 22 U.S. (9 Wheat.) 1, 211 (1824); *Maryland* v. *Louisiana,* 451 U.S. 725, 747, 101 S.Ct. 2114, 2129, 68 L. Ed.2d 576, 596 (1981); *Arizona Public Service Co.* v. *Snead,* 441 U.S. 141, 150, 99 S.Ct. 1629, 1634, 60 L. Ed.2d 106, 113 (1979). A state law is invalid not only when it directly conflicts with federal legislation but also where it " 'stands as an obstacle to the full purposes and objectives of Congress.' " *Perez* v. *Campbell,* 402 U.S. 637, 649, 91 S.Ct. 1704, 1711, 29 L. Ed.2d 233, 242 (1971), quoting *Hines* v. *Davidowitz,* 312 U.S. 52, 67-68, 61 S.Ct. 399, 404-05, 85 L. Ed. 581, 586-88 (1941). Moreover, where "the federal government *** has enacted a complete scheme of regulation *** states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law or enforce additional or auxiliary regulations." *Hines* v. *Davidowitz,* 312 U.S. at 66-67, 61 S.Ct. at 403-04, 85 L. Ed. at 586-87. *See also Rice* v. *Santa Fe Elevator Corp.,* 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447, 1459 (1947).

Federal regulatory schemes applicable to interstate rail roads are particularly dominent and preemptive of state authority, as this Court held recently in a case arising in Iowa. *Chicago & North Western Transportation Co.* v. *Kalo Brick & Tile Co.,*

450 U.S. 311, 318, 101 S.Ct. 1124, 1130, 67 L. Ed.2d 258, 265 (1981).

The federal regulatory scheme applicable to railroads has become even more pervasive over the past decade. Commencing with the enactment of the Railroad Safety Act of 1970, 45 U.S.C. § 421, *et seq.*, Congress engaged in an extensive overhaul of railroad safety regulation and the Interstate Commerce Act for the purpose of eliminating burdens on interstate railroads, in order to make railroads and the national railroad system economically viable and competitive with other modes of transportation and to improve railroad safety. The legislative overhaul included adoption of the Federal Hazardous Materials Transportation Act in 1975, the 4-R Act in 1976 and the Staggers Act in 1980 which, among other things, called for the development of a national transportation policy.

The Railroad Safety Act of 1970, *supra,* affirmatively stated Congressional purpose to "promote safety in all areas of railroad operations" and declares that "*standards relating to railroad safety shall be nationally uniform to the extent practicable*". A state, under the Act, may adopt or continue a rule "when necessary to eliminate or reduce an essentially local safety hazard ... and ... not creating a burden on interstate commerce". The Hazardous Materials Transportation Act, 49 U.S.C. §§ 1801-1812, specifically covers the transportation by interstate carriers of hazardous materials. The Act authorizes the Secretary of Transportation to designate hazardous materials specifically including "flamable liquids ... and compressed gases", which includes propane gas. The Act provides that any state requirement which is inconsistent with the Act "is preempted". It further provides that such requirements are not preempted only if the Secretary determines that such regulations are proper and do "not unreasonably burden commerce". This Act took effect on January 3, 1975, prior to this accident (Pub.

L. 93-633; for legislative history see 1974 U.S. Code, Cong. and Adm. News, p. 7669).

There was no violation by the Trustee of the federal Hazardous Materials Transportation Act or any other act or regulation. Instead, the State of Iowa seeks to extend its common law into this field and impose a civil penalty on the carrier where there has been a specific finding by a jury applying state tort law of no fault by the carrier.

Subsequent to this finding by the jury, the Iowa Supreme Court held for the first time with two judges dissenting that the common carrier exception to absolute liability for carrying hazardous material recognized by the *Restatement*[3] and an overwhelming majority of the Courts will not apply in Iowa, but that a carrier will be absolutely liable without any fault for carrying on an activity required of it by law in a safe manner and in a manner comtemplated by the federal statutory scheme. In short it makes the rail carrier the insuror; (in this case, the Trustee becomes the insuror of the subrogating insurance company, Allendale Mutual).

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[3] §521 of Restatement (Second) of Torts:

521. Abnormally Dangerous Activity Carried on in Pursuance of a Public Duty.

"The Rules as to strict liability for abnormally dangerous activities do not apply if the activity if carried on in pursuance of a public duty imposed upon the actor as a public officer or employee or as a common carrier.

And see *Town of East Troy* v. *Soo Line Railroad Company,* 409 F Supp. 326, 329-330 (E.D. Wisc. 1976); *Fort Worth and Denver City Railway Company* v. *Beauchamp,* 95 Tex. 496, 68 SW 502, 504 (1902); *Actiesselskabet Ingrid* v. *Central R. Co. of New Jersey,* 216 F 72, 78 (2nd Cir. 1914), *rehearing denied,* 216 F 991 (2nd Cir. 1914), *cert. denied,* 238 US 615, 35 S.Ct. 284, 59 L.Ed. 1490 (1915); *Christ Church Parish* v. *Cadet Chemical Corp.,* 199 A2d 707, 708-709 (Conn. 1964); *Pope* v. *Edward M. Rude Carrier Corp.,* 75 SE2d 584, 589-590 (W.Va. 1953);

Closely in point and illustrative of Petitioner's position is the recent Tenth Circuit decision in *Silkwood* v. *Kerr McGee Corp.*, 667 F2d 908 (1981) (appeal to this Court filed May 20, 1982, (No. 81-2159) pending on motion to dismiss, and see 103 S.Ct. 46.) In an action for personal injuries from radiation involving violations of regulations of the Atomic Energy Commission, the Tenth Circuit held that the Atomic Energy Act of 1954, 42 U.S.C. § 2011, *et seq.* preempts the right of an individual to recover punitive damages in a tort action. In that case the defendant did, in fact, violate AEC regulations in the conduct of its plant operations and was liable for actual damages, but the Court held that penalties provided by the AEC were exclusive and that punitive damages could not be awarded as they constitute a penalty in addition to the penalties provided by the Act. The situation is identical here, except that here there was no violation of any regulation. Plaintiff here could recover if there had been a violation of regulations or a violation of a common law duty protecting the local interest, which it did not. Instead, the Iowa Supreme Court wishes to impose what is in the nature of a punitive penalty against the defendant. The *Silkwood* Court cites *Northern States Power Co.* v. *Minnesota,* 447 F.2d 1143 (1971) aff'd. Mem., 405 U.S. 1035, 31 L.Ed.2d 576, 92 S.Ct. 1307 and *Train* v. *Colorado Public Interest Research Group,* 426 U.S. 1, 17, 48 L. Ed.2d 434, 96 S.Ct. 1938 (1976). The *Silkwood* Court states, at p. 923:

> * * * We cannot read that case [Northern States Power] and Train other than as requiring us to hold invalid any state action that competes substantially with the AEC (NRC) in its regulation of radiation hazards associated with plants handling nuclear material. A judicial award of exemplary damages under state law as punishment for bad practices or to deter future practices involving exposure to radiation is no less intrusive than direct legislative acts of the state. Thus we hold punitive damages may not be awarded in this case.

Similarly, state action which competes substantially with the Hazardous Materials Transportation Act and the Railroad Safety Act must also be held to be preempted.

State common law that levies a civil damage penalty regulates the activity involved as effectively as a state regulation. This Court said in *San Diego Unions* v. *Garmon,* 359 U.S. 236, 247 (1959):

> [State] regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.

Quoting *Garmon,* this Court stated in *Chicago & North Western Transportation Co.* v. *Kalo Brick & Tile Co., supra,* at 450 U.S. 317-318:

> And in deciding whether any conflict is present, a court's concern is necessarily with "the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted." San Diego Building Trades Council v. Garmon, supra, at 243.

In *Kalo* state law damage actions were held preempted by federal statutes and regulations governing rail line abanonment. Likewise, the award of damages in this case regulates by penalty interstate rail service that was carried on pursuant to federal duty, in compliance with all federal statutes and regulations, in compliance with all state statutes and regulations, *and* in compliance with all common law governing conduct in relation to an essentially local condition.

The question of federal preemption in this area is perhaps best discussed in Judge MacBride's masterful opinion in *Southern Pacific Transp. Co.* v. *U.S.,* 462 F. Supp. 1193. In that case, the sole question was whether federal or state law pro-

vided the rule of decision governing the application of contributory or comparative negligence standards in a federal tort claims act case. However, Judge MacBride gives an extended discussion of federal preemption, and particularly the *Clearfield Trust* doctrine.[4] *Southern Pacific* holds that state law incorporated into federal law applies in federal tort Claims actions because it is specifically mandated by the Federal Tort Claims Act. However, in discussing the entire field, Judge MacBride reviews important principles which are applicable to the present case and must ultimately be determined by this Court:

1. "If the particular question is one that arises from and bears heavily upon a federal regulatory program then the Clearfield doctrine will require the court to apply federal law to that question. That is the preemption decision". *Id.* p. 1208.

2. "An independent federal rule or decision must be applied when a genuine federal interest would be subjected to uncertainty by application of disparate state rules." *Id.* p. 1208.

3. "State laws that directly conflict with the purposes of the federal regulatory program are inappropriate for adoption and a court faced with conflicting state law would adopt a federal rule." *Id.* p. 1208.

4. "Preemption may be proper in suits wholly between private parties". *Id.* p. 1208.

It is true that Judge MacBride considered, in passing, the effect of the Hazardous Materials Act on the question of federal preemption and concluded that Congress did not intend to "encompass the question of tort liability within the framework of

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[4] *Clearfield Trust Co.* v. *U.S.*, 318 U.S. 363; 87 L. Ed. 838, 63 S. Ct. 754 (1943).

federal law". However, Petitioner submits that (1) The remark is dictum; (2) That the Act post-dated the *Southern Pacific* occurrence; and (3) That the question of allowing the states to assess an additional penalty beyond that set forth by Congress, in the form of punitive damages or absolute liability, was not an issue in *Southern Pacific*. Finally, Judge MacBride considers the Federal Railroad Safety Act of 1970, 45 U.S.C. § 421, *et seq.* The court states at pp. 1224-1225:

> * * * Unlike the Safety Appliance Acts which dealt with specific areas of railroad safety, the 1970 Act's declared purpose is to promote safety in all areas of railroad operations and to reduce railroad-related accidents, and to reduce deaths and injuries to persons and to reduce damage to property caused by accidents involving any carrier of hazardous materials.
>
> 45 U.S.C. § 421. Section 434 of the Act provides:
>
> "The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety *shall be nationally uniform to the extent practicable.* A state may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety *when necessary to eliminate or reduce an essentially local safety hazard,* and when not incompatible with any Federal law, rule, regulation, order, or standard, *and when not creating an undue burden on interstate commerce."* Southern Pacific did not focus on this Act in argument that federal common law should govern the field of railroad tort liability. This court has been unable to discover any decisions under the Act which support the development of such a federal common law to

> supplant state common or statutory law rules such as contributory negligence. Nonetheless, *the Act evinces a clear congressional intent to preempt the regulation of railroad safety, and the cases interpreting the Act recognize that intent.* * * * [Emphasis added]

Southern Pacific only involved a question of whether Nevada or California law should apply on the issue of contributory negligence or comparative negligence. It held that no federal common law rule would be applied, but it did not involve questions of policy going beyond state law and essential local interests such as are involved here and were involved in *Silkwood.*

Iowa's rule of liability without fault is not a standard relating to railroad safety "necessary to eliminate or reduce as essentially local safety hazard". It merely says that a railroad which has complied with every known safety regulation law or standard, and is without any fault must nevertheless pay damages (a civil penalty) because it was required by federal law to have possession of a hazardous material. This clearly creates an "undue burden on interstate commerce", forbidden by Congress.

All the federal railroad safety and regulatory laws must be read together. There is no more persuasive field of federal regulation. Together they entirely preempt the field and forbid the states from assessing additional penalties on rail carriers. These questions have never been directly determined by this Court. Why should a railroad be assessed a penalty by the State of Iowa for carrying this material when such penalty would not be permitted in adjoining states?[1] This is the national uniformity question which Congress has mandated and which this Court must now address.

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[1] The Trustee would not have been held liable without fault under State law if the propane had exploded in Minnesota, *Cairl* v. *City of St. Paul,* 268 NW2d 908 (Mn. 1978), or in Missouri, *Pecan Shoppe, etc.* v. *Tri-State Motor Transit Co.,* 573 S.W.2d 431 (Mo. App. 1978).

It is Petitioner's position that (1) There is a genuine and identifiable federal interest in railroad safety regulation and the transportation of hazardous materials; (2) That when rights and duties of the parties involve questions beyond essential local interests that they derive from a federal source and are substantially related to a pervasive federal regulatory program; (3) that given this federal source, the Supremacy Clause and the doctrine of federal preemption require that this Court apply a federal rule of decision by limiting penalties to those prescribed by Congress; (4) that ordinary state law may be applied so long as that law protects "essential local interests" and does not "burden commerce". However, when local law directly impinges upon the federal statutory scheme by the application of extreme penalties, such as in this case, which do not protect essential local interest and which do burden commerce, then such local rule is preempted by federal law and such penalty is not permitted.

Thus, in this case, the Federal District Court properly submitted the case to the jury for a determination of damages and a determination of negligence under Iowa law and applicable federal statutes, but once the jury determined that there was no negligence and that the railroad was without fault and there was no showing whatsoever of a violation of any federal statute or regulation, that the states cannot independently be permitted to assess another civil penalty upon carriers in the form of liability without fault. This determination must be made by the Federal Courts independent of state law, as the federal law is preemptive. This is the *Silkwood* rule.

Thus, the Magistrate erred in determining that Iowa law applied requiring liability without fault and that the Eighth Circuit erred in applying the Iowa minority position and in giving no consideration of Petitioner's preemption argument.

The Hazardous Materials Transportation Act provides for penalties only for a knowing or willful violation of its provisions. The Iowa Supreme Court, in the absence of any violation of the Act, knowing or unknowing, seeks to penalize the Trustee and all other common carriers by awarding money damages against them when a hazardous material justifies its name. That penalty is in direct conflict with 49 U.S.C. § 1811, which specifically preempts any state law which is inconsistent with any requirement or regulation under the Hazardous Materials Transportation Act, unless upon the application of the appropriate state agency the Secretary of Transportation determines that the state requirement affords a level of protection to the public equal to or greater than the federal requirement, *and* does not unreasonably burden commerce. No such application has been made; the Secretary has made no such finding.

One of the grounds for the penalty imposed by the Iowa Supreme Court was that it would encourage the development of superior safety technology, and would help prevent the occurrence of accidents involving hazardous materials. That responsibility, however, was delegated by Congress to the National Transportation Safety Board. 49 U.S.C. § 1903(a)(1)(c) states that the Board is responsible for investigating the causes of railway accidents involving substantial property damage. It did so in this case. So did the Federal Railway Administration. As a corallary of its investigative duties, the Board is empowered to " ... evaluate the adequacy of safeguards and procedures concerning the transportation of hazardous materials ..." 49 U.S.C. § 1903(a)(8).

Recently, the United States Court of Appeals for the Eighth Circuit, in *Hayfield Northern Railroad Co., Inc.* v. *Chicago and North Western Transportation Co.*, 693 F.2d 819 (8th Cir. 1982), has effectively confirmed the dominance and per-

vasiveness of the Interstate Commerce Act. *Hayfield* holds that such Act, as amended in 1980 by the Staggers Act, preempts even the basic right of a state to condemn abondoned railroad lines for continuing railway purposes, indicating that such a state condemnation law "stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress". The Court in *Hayfield* considered the Interstate Commerce Act, in the area of abandonments, as touching a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. Hayfield appears to represent a new area of federal preemption. Clearly, the Interstate Commerce Act, as amended, and read *in pari materia* with the Federal Railroad Safety Act of 1970 and the Federal Hazardous Materials Act, reflects a dominant and preempting statutory scheme in the field of transportation of hazardous materials by rail.

CONCLUSION

Petitioner does not assert that the federal railroad regulatory scheme entirely preempts state tort law. It does assert that federal laws and regulations setting standards of railroad safety for such things as track, couplers, air brakes, headlights, safety appliances, the transportation of hazardous materials, and all of the myriad things regulated by federal law, are the standards to be applied. Violation of those standards which injure a party constitute violation of a duty and create a cause of action for private individuals which may be redressed by application of traditional state tort law. However, such rules are not merely a sword for the injured plaintiff but compliance with them is necessarily a shield from unwarranted attempts by the states to penalize rail carriers beyond the bounds set by Congress. The states may regulate and declare common law standards of matters involving "essential local interests", such as speed of trains, failure to whistle at crossings, crossing protection, etc., so long

as such rules do not "burden commerce". Nonetheless, when the state goes beyond protection of essential local interests and promulgates laws, regulations or common law rules which burden commerce and assess penalties against a carrier where no negligence, fault or violation of any state or federal law, rule or regulation is shown, that such state action is impermissible by clear congressional mandate. It is now time for this Court to review and give clear definition to these concepts.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

Civil No. 76-198-2

Order

National Steel Service Center,
Plaintiff,

vs.

William M. Gibbons, Trustee of the Property of the Chicago, Rock Island and Pacific Railroad Company,
Defendant.

Plaintiff's Motion For A Directed Verdict

(Filed March 27, 1980)

A jury trial in the above-entitled matter was conducted during the week of March 17, 1980. The case was submited to the jury on March 21, 1980. In response to the special interrogatories propounded to them by the Court, the jury found that the defendant was not laible to the plaintiff under the theory of res ipsa loquitur and found further that the monetary value of the damages to plaintiff's building was $443,623.00. The matter is now before the Court on plaintiff's motion for a directed verdict on the grounds of strict liability that was made at the close of plaintiff's evidence and renewed after the close of all evidence. Defendant has stipulated that if strict liability is applicable to this case, defendant would be liable for the amount of damages fixed by the jury. The only question facing the Court, therefore, is whether the doctrine of strict liability is applicable under the circumstances involved herein.

This case arose out of a derailment and explosion of propane filled tank cars being transported by defendant's railroad. The tank cars, which were owned by parties other than defendant, had been tendered to defendants by another railroad and defendant had a legal obligation to transport the cars regardless of their contents. *See* 49 U.S.C. §11101(a). The explosion — the precise cause of which cannot be determined — resulted in significant damage to plaintiff's building that was located near the scene of the accident.

It is plaintiff's contention that defendant should be strictly liable for any damage resulting from its participation in the ultrahazardous activity of transporting propane gas. Defendant argues that the general rule regarding strict liability for those who participate in ultrahazardous activities should not be applied in this case because the defendant was obligated by law to transport the tank cars and should not, therefore, be subjected to bear a risk that they did not, voluntarily, assume.

Resolution of the strict liability controversy now before the Court must be premised on Iowa law. *Erie Railroad Co.* v. *Tompkins,* 304 U.S. 64 (1938).

The Iowa courts have consistently adhered to the rule that "one who engages in an activity on his own land of such hazardous nature as to involve risk of harm to the person, land, or chattels of neighboring parties . . . is liable for the consequences proximately resulting therefrom without regard to the degree of care, scientific manner in which done, purpose, or motive." *Davis* v. *L & W Construction Company,* 176 N.W. 2d 223, 224-25 (Iowa 1970). It is not clear, however, whether the Iowa courts would extend such liability to common carriers that are transporting hazardous substances. The only Iowa authority relating to common carrier liability in such circumstances was decided in 1887. In *Walker* v. *Chicago, Rock Island & Pacific Railroad Co.,* 71 Iowa 658, 33 N.W. 224 (1887), where a dynamite filled railroad car that was stored on defendant's train

lot exploded, the Iowa Supreme Court found that the defendant was not liable for any damages caused thereby unless negligence by the defendant was established. *Id.* at 225-26. Because the matter currently before the Court involves more active participation in a hazardous activity by the railroad — transportation as opposed to storage of dangerous cargo — and because of the significant evolution of the law relating to torts since the time of the above cited Iowa authority, the Court finds that the *Walker* case should not automatically be accepted as the current Iowa rule.

Defendant argues that because common carriers are obligated by law to transport dangerous cargo, the rule established in the *Walker* case should be retained. Defendant argues further that it would be unfair to place the railroad in the position of an insurer for risks that have not been undertaken voluntarily. The restatement and cases from several jurisdictions other than Iowa are in accord with defendant's position. *See Acctiesselskabet Ingrid* v. *Central Railroad Co. of New Jersey,* 216 F. 72 (2d Cir. 1914); *Christ Church Parrish* v. *Cadet Chemical Corp.,* 25 Conn. Sup. 91, 199 A 2d 707 (1964); *Pope* v. *Edward M. Rude Carrier Corp.,* 138 W. Va. 218, 75 S.E. 2d 584 (1953); *Hertz* v. *Chicago, Indiana and Southern Railroad Co.,* 154 Ill. App. 80 (1910); A.L.I. Restatement of Torts 2d §521.

Plaintiff urges the Court to adopt a second, more recent line of authority that does impose strict liability on common carriers. *See Chavez* v. *Southern Pacific Transportation Co.,* 413 F. Supp. 1203 (E.D.Cal. 1976); *Siegler* v. *Kuhlman,* 81 Wash. 2d 448, 502 P. 2d 1181 (1972). *See also McLane* v. *Northwest Natural Gas Co.,* 255 Or. 324, 467 P. 2d 635 (1970). In *Chavez* v. *Southern Pacific Transportation Co.,* the District Court for the Eastern District of California in a thorough and well-reasoned opinion found that when the conduct by an innocent party of an ultrahazardous activity results in injury to another innocent party, laibility for the injury should fall on the party

that is in the best position to distribute the loss arising therefrom. The *Chavez* court found that between the carrier and the victim, it was the carrier that benefitted from the conduct of the activity and that the carrier was in the best position to fairly distribute the impact of the risk by securing an adjustment in its rates to reflect the risk involved in the course of its busines. *Id.* at 1209. The Iowa courts have found that such allocation of risks is an appropriate justification for the imposition of strict liability in other contexts. *See Hawkeye Security Insurance Co.* v. *Ford Motor Co.*, 174 N.W. 2d 672, 684 (Iowa 1970).

The Court finds that the modern trend, represented by *Chavez*, is the most sensible approach to a difficult problem. There is no dispute regarding the fact that the transport of propane gas in this csae was an ultrahazardous activity. Although the railroad was compelled to transport the propane filled tank cars, it was also the party benefitting from so doing. The rule requiring carriers to transport dangerous substances is designed to benefit the public by making useful but hazardous materials available to locations where they are needed. The railroad is in a much better position with the public benefit to the public at large. Plaintiff, National Steel, was an innocent victim in this matter and should not be compelled to bear the full brunt of the risk associated with a dangerous but necessary activity that affords it no direct benefit.

Defendant's Motion For Directed Verdict

On March 26, 1980, defendant filed a motion for directed verdict on the issues of specific negligence and strict liability.

The Court feels that defendant's motion to direct a verdict on the negligence issue has already been granted on the record in this matter; but to ensure clarity, the Court will formally Order that such motion be granted at this time.

The major issues regarding defendant's motion for directed verdict on the issue of strict liability have been hereinbefore discussed. Defendant's motion does, however, raise two additional issues. Defendant argues that the Interstate Commerce Act preempts liability based on state law. Though the federal act has been held to preempt state regulation of the railroad industry, it does not abrogate the common law regarding torts. Nor has defendant cited a section of the federal act that either directly or impliedly exempts the railroad from tort liability under any theory.

Defendant also argues that the railroad did not have exclusive control over the tank cars at the time plaintiff's damages were caused. Such argument is relevant to the neglience theory of res ipsa loquitur but is not relevant to the issue of strict liability. Defendant does not dispute the fact that the train was engaged in the ultrahazardous activity of transporting propane gas at the time the damage-causing explosion occurred.

Defendant has offered no rationale to support a denial of plaintiff's claim based on strict liability.

In accordance with the foregoing.

IT IS ORDERED that judgment be entered in favor of Plaintiff and against Defendant on the basis of strict liability (Plaintiff's Count III) for $443,623.00.

IT IS FURTHER ORDERED that Defendant's motion be and is hereby granted insofar as it seeks a directed verdict on the claims of specific negligence.

Dated this 27th day of March, 1980.

/s/ R. E. LONGSTAFF
U. S. MAGISTRATE

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF IOWA - CENTRAL DIVISION

Civil Act File No. 76-198-2

National Steel Service Center

vs.

William M. Gibbons, Trustee of the Property of the Chicago, Rock Island and Pacific Railroad Company

JUDGMENT

(Filed March 28, 1980)

This action came on for trial before the Court and a jury, Honorable Harold D. Vietor, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged that judgment is hereby entered in favor of the plaintiff, National Steel Service Center, and against the defendant, William M. Gibbons, Trustee of the Property of the Chicago, Rock Island and Pacific Railroad Company, on the basis of strick liability for Four Hundred Forty-Three Thousand Six Hundred Twenty-Three Dollars and 00/00 Cents ($443,623.00) and the costs of this action;

IT IS FURTHER ORDERED AND ADJUDGED that defendant's motion is hereby granted insofar as it seeks a directed verdict on the claims of specific negligence.

Dated at Des Moines, Iowa, this 28th day of March, 1980.

/s/ James R. Rosenbaum
Clerk of Court

APPENDIX C

IN THE SUPREME COURT OF IOWA

National Steel Service Center, Inc.,

Appellee,

vs.

William M. Gibbons, Trustee of the Property of the Chicago, Rock Island and Pacific Railroad Company,

Appellant.

Certified question of law from United States Court of Appeals for the Eighth Circuit.

Certified question concerning whether the doctrine of strict liablity for abnormally dangerous activities applies to common carriers. CERTIFIED QUESTION ANSWERED.

(Filed May 19, 1982)

Bruce E. Johnson, and Arthur E. Gamble of Gamble, Riepe, Burt, Webster & Davis, Des Moines, and O. L. Houts, Chicago, Illinois, for appellant.

Robert M. Wattson, John C. Hart, and David E. Bland of Robins, Zelle, Larson & Kaplan, Minneapolis, Minnesota, and John A. Templer, Jr., of Davis, Hockenberg, Wine, Brown & Koehn, Des Moines, for appellee.

Considered en banc.

McCORMICK, J.

The United States Court of Appeals for the Eighth Circuit has certified the following question to us: "Does the theory of strict liability for abnormally dangerous activities apply to a common carrier under the circumstances of this case?" We answer the question affirmatively.

The court of appeals recited the facts it deemed relevant to the certified question:

> This is a civil action brought by National Steel Service Center, Inc., (National Steel) against William Gibbons, the bankruptcy trustee of the Chicago, Rock Island and Pacific Railroad Company (Rock Island) for damages resulting from a train accident on September 1, 1975. On that date, the Rock Island operated a train along its right-of-way which consisted in part of eleven tank cars loaded with propane gas. The train derailed and four tank cars exploded, resulting in extensive damage to a warehouse owned by National Steel. National Steel sought recovery under theories of *res ipsa loquitur,* specific negligence, and strict liability.
>
> At trial, the jury ruled in favor of the defendant on the *res ipsa loquitur* claim. The district court directed a verdict for the defendant on the specific negligence theory. The court entered a directed verdict for the plaintiff on the strict liability claim. In a special interrogatory, the jury found that National Steel suffered $443,623 in damages as a result of the explosion, and judgment was entered accordingly.

The certification was in response to a motion by the Rock Island asking the court of appeals to certify to this court the question of whether the theory of strict liability was properly applied in the federal action.

The parties agree that this court has previously adopted the doctrine of strict liability for abnormally dangerous activities in blasting cases. The leading case is *Watson* v. *Mississippi River Power Company,* 174 Iowa 23, 156 N.W. 188 (1916). The court's adherence to the doctrine has been mentioned in other cases. *See Davis* v. *L. & W. Construction Company,* 176

N.W.2d 223, 224-25 (Iowa 1970); *Lubin* v. *Iowa City*, 257 Iowa 383, 389, 131 N.W.2d 765, 769 (1964); *Monroe* v. *Razor Construction Co.*, 252 Iowa 1249, 1251-52, 110 N.W.2d 250, 252 (1961); *Pumphrey* v. *J.A. Jones Construction Company*, 250 Iowa 559, 561, 94 N.W.2d 737, 738 (1959). In *Davis*, the court said the rule is that "if one engages in an activity on his own land of such hazardous nature as to involve risk of harm to the person, land or chattels of neighboring parties, he is liable for the consequences proximately resulting therefrom without regard to degree of care, scientific manner in which done, purpose or motive." 176 N.W.2d at 225. The doctrine stems from the famous English case of *Rylands* v. *Fletcher*, 3 H. & C. 774 (1865), *rev'd* L.R. 1 Ex. 265 (1866), *aff'd* L.R. 3 H.L. 330 (1868). *See Lubin*, 257 Iowa at 386-90, 131 N.W.2d at 768; W. Prosser, *The Law of Torts* § 78 (4th ed. 1971).

The doctrine is incorporated in *Restatement (Second) of Torts* § 519 (1977):

> (1) One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.
>
> (2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.

The reason for the rule is explained in Comment d:

> The liability arises out of the abnormal danger of the activity itself, and the risk that it creates, of harm to those in the vicinity. It is founded upon a policy of the law that imposes upon anyone who for his own purposes creates an abnormal risk of harm to his neighbors, the responsibility of relieving against that harm when it does in fact occur. The defendant's enterprise, in other words, is required to

> pay its way by compensating for the harm it causes, because of its special, abnormal and dangerous character.

Factors for determining whether an activity is abnormally dangerous are delineated in § 520.

Rock Island appears to concede that the strict liability doctrine would apply in this case if it were not a common carrier. It does not deny, for example, that transporting liquified propane gas is an abnormally dangerous activity within the strict liability rule. Therefore we pass that issue. We note, however, that transporting gasoline has been recognized as uniquely hazardous. *See Siegler* v. *Kuhlman,* 81 Wash. 2d 448, 454, 502 P.2d 1181, 1184 (1972), *cert. denied,* 411 U.S. 983, 93 S. Ct. 2275, 36 L. Ed. 2d 959 (1973). The explosive propensity of propane gas has also been demonstrated. *See Farmers Butane Gas Co.* v. *Walker,* 489 S.W.2d 949, 951-52 (Tex. Civ. App. 1973).

The determinative issue presented by the certified question is whether this court will adopt the common carrier exception to the strict liability rule. In making that choice we are confronted with two lines of authority.

One line holds that a common carrier that is required to carry abnormally dangerous cargo offered to it for carriage should not be held strictly liable. The leading case for this view is *Actiesselskabet Ingrid* v. *Central Railroad Co.,* 216 F. 72 (2nd Cir.), *cert. denied,* 238 U.S. 615, 35 S. Ct. 284, 59 L. Ed. 1490 (1914):

> We think there can be no doubt, so far as a common carrier is concerned, that such danger as necessariy results to others from the performance of its duty, without negligence, must be borne by them as an unavoidable incident of the lawful performance of legitimate business . . . . It certainly would be an extraordinary doctrine for courts of justice to promulgate to say that a common carrier is

> under legal obligation to transport dynamite and is an insurer against any damage whi ' may result in the course of transportation, even though it has been guilty of no negligence which occasioned the explosion which caused the injury. It is impossible to find any adequate reason for such a principle.

Id. at 78; *see Town of East Troy* v. *Soo Line Railroad Co.*, 409 F. Supp. 326 (E.D. Wis. 1976); *Christ Church Parish* v. *Cadet Chemical Corp.*, 25 Conn. Supp. 191, 199 A.2d 707 (1964); *Pope* v. *Edward M. Rude Carrier Corp.*, 138 W. Va. 218, 75 S.E.2d 584 (1953).

The second line of authority, shorter but more recent, does not recognize the common carrier exception. The leading case for this view is *Chavez* v. *Southern Pacific Transportation Co.*, 413 F. Supp. 1203 (E.D. Cal. 1976), where the court found that the common carrier exception would not be recognized in California. The court based its decision on the California Supreme Court's use of risk distribution analysis in imposing strict liability in tort in such cases as *Greenman* v. *Yuba Power Product, Inc.*, 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1963). The *Chavez* court reasoned that the common carrier or "public duty" exception is based only on a consideration that it is unfair to impose liability on a carrier for engaging in an activity required by the public. It added:

> But, there is no logical reason for creating a "public duty" exception when the rationale for subjecting the carrier to absolute liability is the Carrier's ability to distribute the loss to the public. Whether the carrier is free to reject or bound to take the explosive cargo, the plaintiffs are equally defenseless. Bound or not, Southern Pacific is in a position to pass along the loss to the public. Bound or not, the social and economic benefits which are ordinarily derived from imposing strict liability are achieved. Those which

> benefit from the dangerous activity bear the inherent costs. The harsh impact of inevitable disasters is softened by spreading the cost among a greater population and over a larger time period. A more efficient allocation of resources results. Thus, the reasonable inference to be drawn from the adoption of the risk distribution rationale in *Smith* v. *Lockheed Propulsion Co.*, [247 Cal. App. 2d 774, 56 Cal. Rptr. 128 (1967)] is that California would follow the path of the Supreme Court of Washington in *Siegler* v. *Kuhlman, supra,* and find that carriers engaged in ultrahazardous activity are subject to strict liability.

413 F. Supp. at 1214. Strict liability was also imposed in *Siegler* v. *Kuhlman,* and the *Chavez* rationale was endorsed and applied in *Indiana Harbor Belt Railroad Co.* v. *American Cyanamid Co.*, 517 F. Supp. 314 (N.D. Ill. 1981), a suit against a manufacturer.

Rock Island contends this court has already recognized the common carrier exception and, since it is the better view, should adhere to that position. We do not believe, however, that the issue has been answered in prior cases, and we believe, in any event, that the *Chavez* line of authority represents the better view.

Common carrier liability for ultrahazardous activity was involved in *Walker* v. *Chicago, Rock Island and Pacific Railroad Co.*, 71 Iowa 658, 33 N.W. 224 (1887). On appeal this court held that the evidence was insufficient to support submission of the case on the theory of negligence relied on by the plaintiff. No claim of liability without fault was made. Subsequently the *Walker* holding was erroneously distinguished in dicta as based on a rule that a carrier could be held liable only for negligence. *Watson* v. *Mississippi Power Company,* 174 Iowa at 35, 156 N.W. at 193. In later cases the court did refuse to impose strict liability on private contractors engaged in blasting pursuant to

public contracts. Those cases, however, were based on a theory that the contractors should enjoy the same immunity for the activity that the government would have had. *See Monroe* v. *Razor Construction Co.*, 252 Iowa at 1252, 110 N.W.2d at 252; *Pumphrey* v. *J.A. Jones Construction Company*, 250 Iowa at 562, 94 N.W.2d at 738. We need not decide the current viability of those holdings. We find that this court has not previously decided the present question.

In arguing that the common carrier exception represents the better view, Rock Island attacks risk distribution analysis as applied to common carriers generally and as applied in the circumstances of this case. It also points out that the exception has been adopted by the American Law Institute in *Restatement (Second) of Torts* section 521.

In attacking risk distribution analysis as applied to carriers generally, Rock Island asserts carriers cannot raise their tariffs to cover past losses. The fallacy in this argument, however, is that risk of liability is a factor to be considered in determining tariffs. *See Akron, Canton & Youngstown Railroad Company* v. *Interstate Commerce Commission*, 611 F.2d 1162, 1170 (6th Cir. 1979), *cert. denied*, 449 U.S. 830, 101 S. Ct. 97, 66 L. Ed. 2d 34 (1980) ("A question of possible liability for damage resulting from carriage of a commodity is therefore within the Commission's jurisdiction as the regulator of the economics of interstate rail transport."). Thus, assuming tariffs cannot be increased to cover past losses, they can be adjusted to cover potential liability. Moreover, tariffs may be set at a level to assure "a reasonable and economic profit or return (or both) on capital employed in the business." 49 U.S.C. § 10704(a)(2). Rock Island cites *Consolidated Rail Corporation* v. *Interstate Commerce Commission*, 646 F.2d 642 (D.C. Cir.), *cert. denied*, U.S. , 102 S. Ct. 587, 70 L. Ed. 2d 488 (1981), as contrary authority. The court in that case, however, merely held that the

Commission did not act illegally in rejecting certain tariffs as unreasonable when they included amounts for a safety measure that the Commission determined was unnecessary.

In challenging application of risk distribution analysis in the circumstances of this case, Rock Island points out that it is bankrupt and that, in contrast, the corporate plaintiff was insured for all but $5,000 of its loss. We decline, however, to decide the issue of a carrier's liability for abnormally dangerous activities on the basis of the parties' relative abilities to spread the risk of loss in a particular case. To achieve a measure of uniformity and predictability, we prefer to adopt a rule for general application. We believe it is more likely in the generality of cases that a carrier will be better able to bear the loss than the party whose property is damaged. Moreover, the carrier is in a position to spread the risk of liability among the beneficiaries of its services. As in *Lubin* v. *Iowa City,* 257 at 391, 131 N.W.2d at 770, we think "they should bear the loss and not the unfortunate individual whose property is damaged without fault of his own." Although tort liability should not always be determined on the basis of which party can ordinarily best stand or distribute the loss, that basis is appropriate in this kind of case. *See id.* at 392, 131 N.W.2d at 771.

Here we have two parties without fault. One of them, the carrier, engaged in an abnormally dangerous activity under compulsion of public duty. The other, who was injured, was wholly innocent. The carrier was part of the dangerous enterprise, and the victim was not. The carrier was in a better position to investigate and identify the cause of the accident. When an accident destroys the evidence of causation, it is fairer for the carrier to bear the cost of that fortuity. Apart from the risk distribution concept, the carrier is also in a better position than the ordinary victim to evaluate and guard against the risk financially.

Furthermore, the carrier is in a superior position to develop safety technology to prevent such accidents, and assessment of accident costs is one means of inducing such developments:

> In some cases it may be reasonably clear that only injurers, or only victims, can be looked to for advances in safety technology or other adjustments that might minimize accident costs . . . .
>
> This analysis might explain the major pockets of strict liability in the law. These include liability for damage caused by "ultrahazardous" activities . . . . All are cases where the potential victims of the injury are not in a good position to make adjustments that might in the long run reduce or eliminate the risk of injury. It is difficult to imagine the development of cost-justifiable technologies that would . . . enable a traveler at a railroad crossing to supervise the selection and monitoring of the railroad's crew.

R. Posner, *Economic Analysis of Law* § 6.11 at 140-41 (2d ed. 1977).

We conclude that the doctrine of strict liability for abnormally dangerous activities should be applied in the circumstances of this case. In so holding we do not overlook the Restatement position. We note, however, that we are committed to a broader application of the strict liability doctrine of *Rylands* v. *Fletcher* than is reflected in the Restatement. We do not limit it to "ultrahazardous activity." *See, e.g., Healey* v. *Citizens' Gas & Electric Co.*, 199 Iowa 82, 201 N.W. 118 (1924); *cf.* W. Prosser, *The Law of Torts, supra,* at 512 ("The Restatement of Torts has accepted the principle of Rylands v. Fletcher, but has limited it to an 'ultrahazardous activity' of the defendant . . . ."). Nor have we limited risk distribution analysis to the products liability field. *See, e.g., Lubin,* 257 Iowa at 391, 131 N.W.2d at 770. For the reasons expressed in this opinion, we decline to adopt the

common carrier exception in *Restatement (Second) of Torts, supra,* section 521. Other Restatement provisions affecting the strict liability doctrine are not at issue here, and we do not pass on them.

We answer the certified question in the affirmative.

CERTIFIED QUESTION ANSWERED.

All Justices concur except Allbee and Schultz, JJ., who dissent, and Uhlenhopp, J., who takes no part.

ALLBEE, J. (dissenting).

I dissent because I believe that the court should adopt as our own rule the common carrier exception to the strict liability rules for abnormally dangerous activities embraced by the American Law Institute in the Restatement (Second) of Torts (1977), to wit:

> § 521 **Abnormally Dangerous Activity Carried on in Pursuance of a Public Duty**
>
> The rules as to strict liability for abnormally dangerous activities do not apply if the activity is carried on in pursuance of a public duty imposed upon the actor as a public officer or employee or as a common carrier.

This exception is explained by Commen *a* to section 521, which states in pertinent part:

> [A] common carrier, in so far as it is required to carry such explosives as are offered to it for carriage, is not liable for harm done by their explosion, unless it has failed to take that car in their carriage which their dangerous character requires.

The considered view of the American Law Institute seems to me to be more authoritative and to carry much greater weight than the reasoning of the single district judge in *Chavez* v. *Southern Pacific Transportation Co.*, 413 F. Supp. 1203 (E.D. Cal. 1976), the decision this court builds upon to reach its ultimate rationale.

Justice Schultz joins this dissent.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 80-1410

National Steel Service Center,

Appellee,

v.

William Gibbons, Trustee of the Property of Chicago Rock Island and Pacific Railroad Company,

Appellant-Movant.

No. 80-1452

National Steel Service Center,

Appellant,

v.

William Gibbsons, Trustee of the Property of Chicago Rock Island and Pacific Railroad Company,

Appellee-Movant,

Appeal and Cross-Appeal from the United States District Court for the Southern District of Iowa.

Submitted: November 26, 1982

Filed: December 2, 1982

Before GIBSON, Senior Circuit Judge, and HEANEY and ARNOLD, Circuit Judges.

HEANEY, Circuit Judge.

This is a civil action brought by National Steel Service Center, Inc., (National Steel) against William Gibbons, the bankruptcy trustee of the Chicago, Rock Island and Pacific Railroad Company (Rock Island) for damages resulting from a train accident on September 1, 1975. On that date, the Rock Island operated a train along its right-of-way which consisted in part of eleven tank cars loaded with propane gas. The train derailed and four tank cars exploded, resulting in extensive damage to a warehouse owned by National Steel. National Steel sought recovery under theories of *res ipsa loquitur*, specific negligence, and strict liability.

At trial, the jury ruled in favor of the defendant on the *res ipsa loquitur* claim. The district court directed a verdict for the defendant on the specific negligence theory. The court entered a directed verdict for the plaintiff on the strict liability claim. In a special interrogatory, the jury found that National Steel suffered $443,623 in damages as a result of the explosion, and judgment was entered accordingly.

After judgment was entered, the Rock Island asked the district court to certify to the Iowa Supreme Court the question of whether the theory fo strict liability was properly applied to this case. The district court denied the request.

On appeal, the Rock Island contended that the trial court erred in directing a verdict against it on the strict liability claim. National Steel argued that the trial court erred in directing a verdict in favor of Rock Island on National Steel's specific negligence claim and in failing to submit the issue of specific negligence to the jury on the *res ipsa loquitur* theory. The Rock

Island renewed its request to certify to the Iowa Supreme Court the question of whether the theory of strict liability was properly applied in this case.

We granted the Rock Island's request to certify the strict liability issue to the Iowa Supreme Court. On May 19, 1982, that Court, sitting *en banc*, held that:

> [T]he doctrine of strict liability for abnormally dangerous activities should be applied in the circumstances of this case. In so holding we do not overlook the Restatement position. [Restatement (Second) of Torts §§ 519, 521 (1977).] We note, however, that we are committed to a broader application of the strict liability doctrict of *Rylands* v. *Fletcher* than is reflected in the Restatement. We do not limit it to "ultrahazardous activity." *See, e.g., Healey* v. *Citizens' Gas & Electric Co.*, 199 Iowa 82, 201 N.W. 118 (1924); *cf.* W. Prosser, *The Law of Torts, supra,* at 512 ("The Restatement of Torts has accepted the principle of Rylands v. Fletcher, but has limited it to an 'ultrahazardous activity' of the defendant . . ."). Nor have we limited risk distribution analysis to the products liability field. *See, e.g., Lubin,* 257 Iowa at 391, 131 N.W.2d at 770. For the reasons expressed in this opinion, we decline to adopt the common carrier exception in *Restatement (Second) of Torts, supra,* section 521. Other Restatement provisions affecting the strict liability doctrine are not at issue here, and we do not pass on them.

National Steel Service Center v. *Gibbons,* 319 N.W.2d 269, 273 (Iowa 1982). We accept this statement of the Iowa law as binding on this Court.

Subsequent to the decision of the Iowa Supreme Court, the Rock Island filed supplementary briefs with this Court in which it contends that federal transportation law preempts the power

of an Iowa state court to place liability without fault upon the trustee of an interstate rail carrier, who under the circumstances of this case has acted in conformity with federal and state regulations and without negligence.

We implicitly decided this question against the Rock Island when we agreed with the Rock Island that its liability hinged upon an unsettled question of state law and certified that question to the Iowa Supreme Court. We expressly affirm that determination now. *See Chicago & Northwestern Transportation Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311 (1981); *Southern Pacific Transportation Co.* v. *United States*, 462 F. Supp. 1193 (E.D. Cal. 1978). Having made this determination, it is unnecessary for us to consider whether there is merit to National Steel's remaining contentions.

Affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX E

Table of Contents of Petitioner's Brief in the Court of Appeals for the Eighth Circuit filed prior to Certification to the Supreme Court of Iowa:

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Table of Contents of Petitioner's Reply Brief in the Court of Appeals for the Eighth Circuit filed prior to Certification to the Supreme Court of Iowa:

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No. 82-1600

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NATIONAL STEEL SERVICE CENTER, INC.,
Respondent,

v.

WILLIAMS GIBBONS, Trustee of the property of the Chicago Rock Island and Pacific Railroad Company,
Petitioner.

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

I. Does Federal transportation law and national transportation policy pre-empt the power of the State of Iowa to provide a tort remedy to its citizens in the form of liability without fault when an interstate rail carrier engages in an ultra-hazardous activity?

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No. 82-1600

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NATIONAL STEEL SERVICE CENTER, INC.,
Respondent,

v.

WILLIAMS GIBBONS, Trustee of the property of the Chicago Rock Island and Pacific Railroad Company,
Petitioner.

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JURISDICTION

The jurisdictional statement in the Petition for Certiorari is accurate.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Interstate Commerce Act, 49 U.S.C. § 10103 provides:

> The remedies provided under this subtitle are in addition to the remedies existing under another law or at common law.

The Railroad Safety Act, 45 U.S.C. § 434 provides:

A state may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the secretary has adopted a rule, regulation, order or standard governing the subject matter of such state requirement.

STATEMENT

Although respondent is not in agreement with the characterization of this case as set forth in petitioner's Statement, the differences are not relevant to the issue of whether this Court should grant certiorari with the exception of petitioner's characterization of Iowa law as imposing a civil penalty on a rail carrier and its assertion that *Silkwood* v. *Kerr-McGee Corp., infra,* represents a conflict between the Eighth and Ten Circuits on Federal pre-emption law.

Compensatory damages for victims of an ultra-hazardous activity are not a "penalty" anymore than the same damages are when negligence can be proved. As will be demonstrated below, there is no conflict between the Eighth and Tenth Circuits on Federal pre-emption law as it relates to the imposition of liability without fault. Both Courts have upheld awards on that theory.

REASONS FOR DENYING THE WRIT

The Court Below Correctly Held That Federal Law Does Not Pre-Empt The Imposition Of State Tort Liability Upon An Interstate Railroad Carrier Which Engaged In An Ultra-Hazardous Activity.

Petitioner argues that the Court below erred in allowing respondent to recover damages caused by petitioner's ultra-hazardous activity which severely damaged respondent's property, arguing that the imposition of state tort remedies are preempted by federal law. It is elementary, however, that pre-emption of state law by federal statutes or regulations is not favored. *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311 (1981).

Petitioner argues that the Interstate Commerce Act (49 U.S.C. § 10101 *et seq.*), the Hazardous Materials Transportation Act (49 U.S.C. § 1801 *et seq.*), and the Railroad Safety Act (45 U.S.C. § 431 *et seq.*) pre-empts the imposition of liability without fault against petitioner in the context of this case. Petitioner does not, however, cite any case which so holds. To the contrary, each of these statutes expressly contemplates that state tort principles can be applied to common carriers such as petitioner, notwithstanding that Congress has regulated the area in part. The Interstate Commerce Act provides:

> The remedies provided under this subtitle are in addition to the remedies existing under another law or at common law.

49 U.S.C. § 10103. The Railroad Safety Act specifically authorizes state "regulation" of non-federally-regulated activity:

> A state may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order or standard governing the subject matter of such State requirement.

45 U.S.C. § 434. The Hazardous Materials Transportation Act pre-empts only a state requirement "which is inconsistent with any requirements set forth in this chapter . . ." 49 U.S.C. § 1811(a).

Notably absent in each of these statutes is any provision for civil remedies. Congress no doubt has the power under the Commerce Clause to provide such remedies if it so chooses. Congress has expressly chosen not to do so. As a federal district court noted in *Southern Pac. Transp. Co.* v. *United States:*

> . . . '[t]ort law has historically been left to the states and . . . the federal courts should not assume an alteration in that historical approach in the absence of a clear indication of the intent of Congress.

462 F.Supp. 1193, 1217 (E.D.Cal. 1978). That Congress did not intend to pre-empt the imposition of state tort remedies is implicit in the absence of any remedial rights under any of these statutes to persons injured by the activities of a common carrier.

The argument made by petitioner was made and rejected in *Southern Pac. Transp. Co.* v. *United States,* 462 F.Supp. 1193 (E.D. Cal. 1978). There, *Southern Pacific* brought an action against the United States for various damages arising out of the explosion giving rise to the litigation in *Chavez* v. *Southern Pac. Transp. Co.,* 413 F.Supp. 1203 (E.D. Cal. 1976). The issue before the court was whether the Interstate Commerce Act, the Hazardous Materials Transportation Act, and the Railroad Safety Act pre-empted the imposition of state tort rules of contributory negligence in the action by the Southern Pacific against the United States. The trial court thoroughly examined the pre-emption doctrine springing from *Clearfield Trust Co.* v. *United States,* 318 U.S. 363 (1943), and concluded:

> Although the Federal Railroad Safety Act of 1970 and the cases construing it reflect the congressional intent to pre-empt the regulation of railroad safety and achieve national uniformity, no indication is given in the Act or its legislative history that Congress intended to pre-empt state tort liability doctrines affecting the remedies either for violation of the federal regulations in particular, or for railroad related accidents in general. In the absence of such an indication of congressional intent, this court concludes that congress intended no alteration in the prevailing scheme of federal law as it inter-relates with state law. . .

462 F.Supp. at 1226.

In analogous situations, the federal courts have consistently held that federal regulations do not pre-empt the imposition of state tort remedies. *See Raymond* v. *Riegel Textile Corp.,* 484 F.2d 1025 (1st Cir. 1983); *Hubbard-Hall Chem. Co.* v. *Silverman,* 340 F.2d 402 (1st Cir. 1965). In *Rucker* v. *Norfolk &*

Western Ry. Co., 77 Ill.2d 434, 396 N.E.2d 534, *rev'g* 64 Ill. App. 3d 770, 381 N.E.2d 715 (1978), the court rejected defendant's argument that a railroad tank car which complied with federal regulations could not be found defective under the Illinois version of strict products liability. The court specifically found no indication in the federal regulations that Congress intended to pre-empt state tort law by enacting the Railroad Safety Act or the Interstate Commerce Act.

Petitioner seeks to create an ostensible conflict between the Eighth Circuit's decision in the instant case and the Tenth Circuit's decision in *Silkwood* v. *Kerr-McGee Corp.*, 667 F.2d 908 (10th cir. 1981), *petition for cert filed,* No. 81-2159. Petitioner argues that the imposition of tort liability in the instant case is analogous to the imposition of punitive damages in the *Silkwood* case.

It is clear that this case is analogous to *Silkwood,* but not for the reasons petitioner suggests. In *Silkwood,* the jury awarded damages for personal injuries, punitive damages and injury to plaintiff's personal property damaged by plutonium contamination under a liability without fault theory. 667 F.2d at 921. Defendant appealed from this verdict. The Tenth Circuit held that the personal injury award was governed by the State Workmen's Compensation Act and that punitive damages could not be awarded since they would constitute a penalty and were awarded as punishment for bad practices or to deter future practices involving exposure to radiation. The court held that this was an area pre-empted by federal regulation. Judge Doyle dissented from both of these holdings.

However, the Tenth Circuit was unanimous in holding that the award of property damage under a liability without fault theory was proper and did not conflict with the federal regulatory scheme. The Court noted that the Atomic Energy Commission did not have the power to order compensation to a victim of a nuclear incident. 667 F.2d at 920. None of the Acts

relied upon by the petitioner provide for an award to the victim of a railroad accident.

Petitioner's attempt to equate the damages awarded in this case with the punitive damages awarded in *Silkwood* is untenable. The damages awarded respondent in this case are compensatory damages, proximately caused by petitioner's ultra-hazardous activity. The punitive damages awarded in *Silkwood* were intended to punish defendant for its outrageous conduct and to deter it from similar conduct in the future. These damages were in excess of the compensatory damages awarded in *Silkwood*. Because of the regulatory nature of the punitive damages, the Tenth Circuit concluded that the award violated the provisions of the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-284, which granted the Atomic Energy Commission specific and comprehensive powers to punish and prohibit practices it regarded as improper. The award of compensatory damages in this case, since they are compensatory in nature, does not infringe upon Congress' intent to regulate the railroad industry.

CONCLUSION

There is no intimation in any of the federal legislation that Congress intended to pre-empt the imposition of state tort liabilities on railroads which engage in ultra-hazardous activities. The Iowa Supreme Court has determined that common carriers, including railroads, are not exempt from liability for engaging in ultra-hazardous activities. The award of compensatory damages for such an activity on behalf of the railroad is not prescribed by any federal legislation.

Petitioner has failed to cite any decision of a federal court of appeals in conflict with the decision of the Eighth Circuit in this case; nor has petitioner shown that the decision of the Eighth Circuit Court of Appeals is in conflict with a similar decision by a state court of last resort; nor has the petitioner shown that the

Eighth Circuit so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Petitioner's application for a Writ of Certiorari ought be denied.

Respectfully Submitted,

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

WILLIAM GIBBONS, Trustee of the Property of
CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,
Petitioner,

v.

NATIONAL STEEL SERVICE CENTER, INC.,
Respondent.

PETITIONER'S REPLY BRIEF IN RESPONSE TO RESPONDENT'S BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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ARGUMENT

Respondent misconceives the thrust of the federal preemption rule and Petitioner's analogy to *Silkwood* v. *Kerr-McGee,* 667 F2d 908 (CA 10 1981). The compensatory property damage judgment *Silkwood* does not hold that a state law rule of strict liability for nuclear related property damage occurring off the plant site may not be preempted by federal law. The Court in *Silkwood* said that imposing such a state tort rule of strict liability "might, in some instances, encroach upon federal regulations setting effluent or other standards." *Id.* at 920. The Court cited *State Department of Environmental Protection* v. *Jersey Central Power & Light Co.,* 351 A2d 337 (NY 1976), and *Van Dissel* v. *Jersey Central Power & Light Co.,* 377 A2d 1244 (NJ 1977). In those cases the plaintiffs claimed damages on theories including strict liability because a nuclear plant's cooling system discharged water that changed the waterway from

fresh to salt water and/or changed the temperature of the water in the waterway. In both cases the New Jersey Court held federal regulations preempted state law strict liability claims for damages because federal law had preempted the area and monetary awards would interfere with federal regulations on cooling and discharge systems.

In *Silkwood* the property damage claim was for only $5,000. The Court said: "We do not think imposition of tort liability in the instant case, in which a quantity of plutonium had escaped the plant site and caused damage, will significantly interfere with the federal regulation of Kerr-McGee's plant." *Silkwood, supra,* at 920. The Court placed reliance upon its conclusion that:

> " 'Nuclear energy is surely an area' in which no court will, at last, refuse to recognize and apply the principle of strict liability'. W. Prosser, *The Law of Torts,* § 78, at 516 (4th ed. 1971); *see* Restatement (Second) of Torts, § 520, comment (g) (1977) * * *"

However, in transportation law the common carrier exception to liability without fault for extra-hazardous cargos in the rule in almost every jurisdiction. *Restatement (Second) of Torts,* § 521; Prosser, *The Law of Torts,* (1971), ch. 13 at 525.

Even in the early landmark case on escape of hazardous substances, *Rylands* v. *Fletcher,* L.R. 3 H.L. 330 (1968), Blackburn Judge, in the Court of Exchequer Chamber, conceded: "Traffic on the highways, whether by land or sea, cannot be conducted without exposing those whose persons or property are near it to some inevitable risk; and, that being so, those who go on the highway or have their property adjacent to it may well be held to do so subject to their taking upon themselves the risk of injury from that inevitable danger. *** In neither case therefore can they recover without proof of want of care or skill occasioning the accident."

In *Silkwood* the possession of the hazardous nuclear material was a voluntary commercial choice on the part of the defendant, Kerr-McGee, and the $5,000 property damage award did not interfere with federal regulations applying to the nuclear plant. In the present case the Railroad Trustee had possession of the hazardous material pursuant to a federally mandated transportation duty and was found by the jury not to have violated any federal track and roadbed standards, equipment standards, employee work standards, speed standards, or any state train operation standards or state negligence standards (even under a *res ipsa loquitur* jury instruction). The attempt of the Iowa Court to assess liability without fault is analagous to the attempt of the Trial Court to assess punitive damages in *Silkwood*. Where the purpose of Congress in legislating in an area is to secure uniformity of standards and principles of decision in that area, state law that supplements or compliments federal regulations "is as fatal as state regulations which conflict with the federal scheme:. *Campbell* v. *Hussey*, 368 US 297, 302 (1961); *Charleston & W.C. R. Co.* v. *Varnville Furniture Co.*, 237 US 597, 604 (1915).

In any event the *Silkwood* judgment awarding compensatory damages caused by radiation without any finding of violation of a federal safety statute or regulation is in direct conflict with this Court's recent and crystal clear dicta in *Pacific Gas and Electric Co., et al.* v. *State Energy Resources Conservation & Development Commission, et al.*, decided April 20, 1983, United States Law Week, Vol. 51, p. 4449. In *Pacific Gas* this Court said with regard to the regulation of the safety of nuclear energy, "When the federal government completely occupies a given field or an identifiable portion of it, as it has done here, the test of preemption is whether 'the matter on which the state asserts the right to act is in any way regulated by the federal government.' " Compelling payment of a damage award is intended to be and is in fact "a potent method of governing conduct and controlling policy. *San Diego Unions* v. *Garmon*, 359 US 236, 247 (1959). A

state Court damage award with no finding fault on the part of the defendant conflicts with federal policy in the nuclear energy safety field. A no-fault damage award also conflicts with federal policy in the rail safety field in the case now before this Court.

The physical plants of rail companies cross state lines. In no other industry is the need for uniformity greater than the rail industry because of the peculiar interstate nature of its plant facilities, its essential importance to the nationa, and its generally low capital structure.

The Federal Railroad Safety Act of 1970 specifically states at 45 U.S.C. § 434:

> "The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A state may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce."

Awarding damages against a common carrier not at fault and in full compliance with all federal and state regulations is not "necessary to eliminate or reduce an essentially local safety hazard". Such local law is directly contrary to the Congressional mandate that "standards relating to railroad safety shall be nationally uniform to the extent practicable". Further, there

would be no liability, in the absence of fault, if the occurrence was in either Minnesota or Missouri.[1]

The Federal Hazardous Materials Transportation Act specifically states:

> "§ 1811. *Relationship to other laws*
>
> "General
>
> "(a) Except as provided in subsection (b) of this section, any requirement, of a State or political subdivision thereof, which is inconsistent with any requirement set forth in this chapter, or in a regulation issued under this chapter, is preempted.
>
> "State laws
>
> "(b) Any requirement, of a State or political subdivision thereof, which is not consistent with any requirement set forth in this chapter, or in a regulation issued under this chapter, is not preempted if, upon the application of an appropriate State agency, the Secretary determines in accordance with procedures to be prescribed by regulation, that such requirement (1) affords an equal or greater level of protection to the public than is afforded by the requirements of this chapter or of regulations issued under this chapter and (2) does not unreasonably burden commerce. Such requirement shall not be preempted to the extent specified in such determination by the Secretary for so long as such State or political subdivision thereof continues to administer and enforce effectively such requirement."

No application has been made by Iowa to the Secretary to change Iowa law and impose liability in the face of a jury verdict finding no negligence; and in view of the law in the other States

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[1] *Carl* v. *City of St. Paul*, 268 NW2d 908 (Mn. 1978); *Pecan Shoppe, etc.* v. *Tri-State Motor Transit Co.*, 573 SW2d 431 (Mo. App. 1978).

and the Trustee's compliance with all federal and state rules, the no fault money judgment against the Trustee does "unreasonably burden commerce".

Respondent National Steel Service Center, Inc. misconstrues the import of 49 U.S.C. §10103, formerly 49 U.S.C. §22, which states the remedies under the Interstate Commerce Act "are in addition to the remedies under another law or at common law." Respondent misapprehends the import of §10103. In *Chelentis* v. *Luckenbach S.S. Co.*, 247 US 372, 382-384, 62 L.Ed. 1171, 1176-1177, 38 S.Ct. 501 (1917), the Court construed a saving statute which, like §10303, preserved common law remedies. In *Chelentis, Id.* at 247 US 383, the Court approved the statement: "It is not a remedy in the common-law courts, which is saved, but a common-law remedy." The Court in *Chelentis* held:

> "The distinction between rights and remedies is fundamental. A right is a well-founded or acknowledged claim; a remedy is the means employed to enforce a right or redress an injury. Bouvier's Law Dict. Plainly, we think under the saving clause a right santioned by the maritime law may be enforced through any appropriate remedy recognized at common law; but we find nothing therein which reveals an intention to give the complaining party an election to determine whether the defendant's liability shall be measured by common-law standards rather than those of the maritime law. Under the circumstances here presented, without regard to the court where he might ask relief, petitioner's rights were those recognized by the law of the sea."

A damage remedy permitted under state law may be obtained for violation of a federal statute or regulation governing interstate rail carriers. A damage remedy permitted under state law may be obtained for violation of a state law standard only to the extent the standard does not contravene the guidelines set out in 45 U.S.C. §434, 49 U.S.C. §1811, or other similar statutes, and does not interfere with federal regulations or otherwise unduly interstate commerce.

CONCLUSION

The jury in this case determined that there was no violation of a state tort law protecting an essential local interest, nor any violation of a federal regulatory standard. In these circumstances, the *Clearfield*[1] doctrine establishes "In absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards". It is, thus, a federal question whether the Railroad can be held liable without fault and in the absence of a body of federal common law and in the interests of uniformity the common carrier exception to liability for carriage of hazardous materials set forth in the *Restatement* should be applied by the Federal Courts.

Respectfully submitted,

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[1] *Clearfield Trust Co. v. US*, 318 US 363; 87 L.Ed. 838; 63 S.Ct. 754 (1943).

No. 82-1600

In the Supreme Court of the United States

OCTOBER TERM, 1983

WILLIAM GIBBONS, TRUSTEE OF THE PROPERTY OF CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, PETITIONER

v.

NATIONAL STEEL SERVICE CENTER, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether federal transportation law preempts a state tort rule of strict liability for interstate rail carriers hauling hazardous substances.

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OCTOBER TERM, 1983

No. 82-1600

WILLIAM GIBBONS, TRUSTEE OF THE PROPERTY OF CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, PETITIONER

v.

NATIONAL STEEL SERVICE CENTER, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order of May 16, 1983, inviting the Solicitor General to express the views of the United States.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A18-A21) is reported at 693 F.2d 817. The opinion of the Supreme Court of Iowa on certification of a question of state law (Pet. App. A7-A17) is reported at 319 N.W.2d 269. The opinion of the district court (Pet. App. A1-A5) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 2, 1982. A petition for a rehearing was denied on December 28, 1982. The petition for a writ of certiorari was filed on March 25, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI, Clause 2 of the Constitution of the United States provides:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof * * * shall be the Supreme Law of the Land * * *.

The Federal Railroad Safety Act of 1970, 45 U.S.C. 434, provides:

> The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

The Hazardous Materials Transportation Act, 49 U.S.C. 1811 provides:

> (a) Except as provided in subsection (b) of this section, any requirement, of a State or political subdivision thereof, which is inconsistent with any requirement set forth in this chapter, or in a regulation issued under this chapter, is preempted.
>
> (b) Any requirement, of a State or political subdivision thereof, which is not consistent with any requirement set forth in this chapter, or in a regulation issued

under this chapter, is not preempted if, upon the application of an appropriate State agency, the Secretary determines, in accordance with procedures to be prescribed by regulation, that such requirement (1) affords an equal or greater level of protection to the public than is afforded by the requirements of this chapter or of regulations issued under this chapter and (2) does not unreasonably burden commerce. Such requirement shall not be preempted to the extent specified in such determination by the Secretary for so long as such State or political subdivision thereof continues to administer and enforce effectively such requirement.

STATEMENT

Respondent brought this action against the bankruptcy trustee of the Chicago, Rock Island and Pacific Railroad Company for damages resulting from a train accident that occurred on September 1, 1975. On that date, a train operated by the Railroad and loaded with propane gas derailed and exploded, damaging respondent's warehouse.

The district court directed a verdict for petitioner on respondent's negligence theory, and the jury found for petitioner on the issue of res ipsa loquitur. The district court thereafter granted respondent's motion for a directed verdict on a theory of strict liability. In a special interrogatory the jury had found respondent's damages to be $443,623. Judgment was entered accordingly.

On appeal, the Eighth Circuit certified to the Iowa Supreme Court the question whether strict liability for abnormally dangerous activities applies to common carriers (which are required by law to carry abnormally dangerous cargo).[1] On May 19, 1982 that court (en banc) held that

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[1] See 49 U.S.C. (Supp. V) 11101(a); *Akron, Canton and Youngstown R.R.* v. *ICC*, 611 F.2d 1162 (6th Cir. 1979), cert. denied, 449 U.S. 830 (1980).

there should not be a common carrier exception to the doctrine of strict liability for abnormally dangerous activities. It reasoned (Pet. App. A14-A15):

> Here we have two parties without fault. One of them, the carrier, engaged in an abnormally dangerous activity under compulsion of public duty. The other, who was injured, was wholly innocent. The carrier was part of the dangerous enterprise, and the victim was not. The carrier was in a better position to investigate and identify the cause of the accident. When an accident destroys the evidence of causation, it is fairer for the carrier to bear the cost of that fortuity. Apart from the risk distribution concept, the carrier is also in a better position than the ordinary victim to evaluate and guard against the risk financially.
>
> Furthermore, the carrier is in a superior position to develop safety technology to prevent such accidents, and assessment of accident costs is one means of inducing such developments * * *.

Relying on *Chicago & North Western Transportation Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311 (1981), the Eighth Circuit then determined that federal transportation law did not preempt Iowa's authority to impose strict liability on common carriers. Accepting the Iowa Supreme Court's statement of Iowa law as binding on it, the court of appeals affirmed the judgment of the district court.

DISCUSSION

The court of appeals' conclusion—that federal transportation law does not preempt Iowa's common law power to impose liability without fault on the trustee of an interstate rail carrier—is correct and does not conflict with any decision of this Court or any court of appeals. Further review is unwarranted.

1. "[T]he Supremacy Clause invalidates states laws that 'interfere with or are contrary to, the laws of Congress . . . . ' *Gibbons* v. *Ogden*, 9 Wheat. 1, 211 (1824)." *Chicago & North Western Transportation Co.* v. *Kalo Brick and Tile Co.*, *supra*, 450 U.S. at 317. Congressional intent to preempt may be express or implied. *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977). Even when state law is not completely displaced, it may be preempted to the extent of actual conflict with federal laws, *Florida Lime and Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-143 (1963), or when it interferes with "the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941) (footnote omitted). A state tort action for damages is also preempted when it interferes with a federal regulatory scheme, even if the federal agency has declined to exercise its jurisdiction. *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 246-247 (1959).

The federal statutes pertaining to railroad safety and the transportation of hazardous materials—the Federal Railroad Safety Act of 1970 ("FRSA"), 45 U.S.C. 421 *et seq.*, and the Hazardous Materials Transportation Act ("HMTA"), 49 U.S.C. 1801 *et seq.*—do not preempt the state common law rule at issue here. The primary purposes of these acts are to establish uniform standards for safe rail operations, to assure the safe transportation of hazardous materials in commerce, and to provide civil and criminal penalties and other enforcement tools to encourage compliance. But the penalties contemplated by the FRSA and the HMTA are not designed to compensate victims of rail accidents, and neither statute purports to address the remedies available to those victims.[2]

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[2]We note that in other rail safety legislation where Congress has chosen to address the question of liability for personal injuries it has done so expressly. See, *e.g.*, the Federal Employers' Liability Act, 45 U.S.C. 51-60.

The Department of Transportation regulations, 49 C.F.R. Parts 171-179, 213, 215-225, likewise address the manner in which hazardous materials are transported, but not the standard of tort liability for damages arising out of their carriage. Thus the effectiveness of the Department's regulations is not hampered by Iowa's choice not to recognize a common carrier exception to the rule of strict liability for ultrahazardous activities.

That Congress did not intend to preempt state rules in the absence of federal action on the standard of tort liability is clear from the language of the statutes' preemption provisions. The FRSA expressly permits a state to "adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement." 45 U.S.C. 434; H.R. Rep. No. 91-1194, 91st Cong., 2d Sess. 19 (1970). Similarly, under the HMTA, only a requirement "which is inconsistent with any requirement set forth in this chapter, or in a regulation issued under this chapter, is preempted." 49 U.S.C. 1811(a).

The state rule here fixes the standard of tort liability applicable to the common carriage of hazardous materials. The Secretary of Transportation has not issued any regulations on this subject under either the FRSA or the HMTA. Since neither the statutes nor the regulations address this issue, the state rule is permitted to stand. See *Southern Pacific Transportation Co.* v. *United States*, 462 F. Supp. 1193, 1223-1226 (E.D. Cal. 1978) (federal regulation of interstate railroad transportation of hazardous materials not so pervasive as to preempt state law governing contributory or comparative negligence standard). Cf. *Rucker* v. *Norfolk & W. Ry.*, 64 Ill. App. 3d 770, 777-778, 381 N.E. 2d 715, 722 (App. Ct. 1978), rev'd on other grounds, 77 Ill. 2d 434, 396 N.E. 2d 534 (S. Ct. 1979).

2. Petitioner erroneously asserts that the court of appeals' decision conflicts with the decision of the Tenth Circuit in *Silkwood* v. *Kerr-McGee Corp.*, 667 F.2d 908 (10th Cir. 1981), juris. postponed, No. 81-2159 (Jan. 10, 1983). The Tenth Circuit held in *Silkwood* that a state could apply a strict liability standard in a tort action for nuclear-related property damage, despite the pervasive federal regulation of the nuclear industry and Kerr-McGee's substantial compliance with federal requirements. 667 F.2d at 920-921.

Petitioner apparently relies on *Silkwood's* additional holding that the federal statutory and regulatory scheme in nuclear energy matters prevents a state from awarding punitive damages under state law for torts committed by federal licensees. See 667 F.2d at 921-923. But the federal government regulates the processing and handling of plutonium to a far greater extent than it does other hazardous materials. See 81-2159 Br. for the U.S. as Amicus Curiae 13-23.[3] As this Court noted in *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation & Development Commission*, No. 81-1945 (Apr. 20, 1983), slip op. 19, "the federal government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the states." And the Atomic Energy Act makes clear that states may not regulate nuclear plants "for purposes [of] protection against radiation hazards" (42 U.S.C. 2021(k)). Since punitive damages do not compensate victims for damages suffered, they can only be understood as a means of inducing licensees to protect against future accidents. The award of such damages is thus inconsistent with the regulatory system—enforced by criminal and civil penalties—created by the Atomic Energy Act. 42 U.S.C. (& Supp. V) 2271-2284.

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[3]We have provided counsel for petitioner and respondent with copies of our brief in that case.

This case, by contrast, involves no punitive damages and concerns statutes entirely distinct from the Atomic Energy Act. Both the FRSA and HMTA contemplate state regulation until the Secretary acts with respect to the particular subject matter. There is accordingly, no conflict with the Tenth Circuit's decision in *Silkwood*.

3. Petitioner has also suggested (Pet. 15; see Pet. App. A2-A4) that preemption is appropriate here because the Interstate Commerce Act imposes an obligation on rail carriers to transport hazardous substances. See note 1, *supra*. But any burden that strict liability might place on a rail carrier's fulfillment of its common carrier responsibilities under the Interstate Commerce Act can be reflected in the carrier's rates for the transportation of hazardous substances. Iowa's standard of strict liability thus does not impede federal rail policy.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DOJ-1983-08

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

WILLIAM GIBBONS, Trustee of the Property of
CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,
Petitioner,

v.

NATIONAL STEEL SERVICE CENTER, INC.,
Respondent.

REPLY OF PETITIONER TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether Federal Transportation Law pre-empts a state tort rule of liability without fault for interstate rail carriers hauling hazardous substances.

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ARGUMENT

The brief of the United States concludes that further review of this case is not warranted. Careful examination of the brief of the Solicitor General, however, reveals that certain of the positions expressed in the brief help explain why Federal preemption of state tort liability without fault in the rail industry is the correct rule. Three mistakes cause the brief of the Solicitor General to reach a faulty conclusion.

1. At page 5 the Solicitor General's brief correctly summarizes the purposes of the Federal Railroad Safety Act of 1970, 45 U.S.C. 421 et seq., and the Hazardous Materials Transportation Act, 49 U.S.C. 1801 et seq.: "The primary purposes of these acts are to establish uniform standards for safe rail operations, to assure the safe transportation of hazardous material in commerce, and to provide civil and criminal

penalties and other enforcement tools to encourage compliance." The Solicitor General's brief recognizes that the Federal Railroad Safety Act of 1970 allows states only: (1) to continue in force existing statutes and regulations until the Federal Railroad Administration adopts a regulation or requirement covering the subject matter; and (2) to enact a more stringent regulation or standard when necessary to eliminate an "essentially local safety hazard" but only if the state regulation or standard is not incompatible with any Federal law or regulation *and* does not create an undue burden on interstate commerce. 45 U.S.C. §434. The brief further recognizes that the Hazardous Materials Transportation Act preempts any requirement of a state that is inconsistent with any requirement of the Act or a regulation issued under the Act. 49 U.S.C. §1811(a).

However, the Solicitor General's brief misapprehends the intent of Congress in passing railroad safety regulations during the 1970's. The pervasive and preemptive authority of these acts is evident in the legislative history of the Federal Railroad Safety Act of 1970. 1970 U.S. Code Cong. & Ad. News, 4104. The Report of the House Committee on Interstate and Foreign Commerce shows that the Congress intended "... to promote safety in *all areas of railroad operations...*" Id., at 4104 (emphasis added). The Congress was acutely aware of the need for a *national* safety program, commenting on the prior lack of uniformity of the regulations of the various states. Id., at 4015. Noting that previous Federal safety statutes had been effective but were limited to "special types of railroad safety hazards," the Committee described the Federal Railroad Safety Act as "the most comprehensive rail safety legislation ever reported to the Congress." Id., at 4105, 4106.

Each of these predecessor safety statutes had been held preemptive. See *Gilvary* v. *Cayohoga Valley R.R.*, 292 U.S. 57 (1934) (Safety Appliance Act, 45 U.S.C. §§ 1-16); *Napier* v. *Atlantic Coast Line R.R.*, 272 U.S. 605 (1926) (Boiler Inspection Act, 45 U.S.C. §§ 22-34); and *Erie R.R.* v. *People*, 233

U.S. 671 (1914) (Railroad Hours of Service Law, 45 U.S.C. §§ 61-64b). Expressly recognizing the preemptive nature of Congress' previous federal legislation, and borrowing certain of its provisions from the Natural Gas Pipeline Safety Act of 1968, the Committee stated that it "...does not believe that safety in the nation's railroads would be advanced sufficiently by subjecting the national system to a variety of enforcement in 50 different judicial and administrative systems." 1970 U.S. Code Cong. Ad. News 4109. Citing the interstate nature of the railroad industry, the Committee expressed its concern about multiple, conflicting requirements imposed by local jurisdictions:

> "The integral operating parts of these companies cross many state lines. In addition to the obvious areas of rolling stock and employees, such elements as operating rules, signal systems, power supply systems, and communications systems of a single company normally cross numerous state lines. *To subject a carrier to enforcement before a number of different State administrative and judicial systems in several areas of operations could well result in an undue burden on interstate commerce.*"

Id., at 4110-4111 (emphasis supplied).

While the Federal Railroad Safety Act of 1970 was generally patterned on the Natural Gas Pipeline Safety Act, 49 U.S.C. §§ 1600 et seq., differing provisions were adopted due to the differing natures of the two industries being regulated. 1970 U.S. Code Cong. & Ad. News 4109-4110. In the case of the Natural Gas Pipeline Safety Act, Congress specifically provided that "[n]othing in this chapter shall affect the common law or statutory tort liability of any person." 49 U.S.C. 1677(b). The legislative history of the Natural Gas Pipeline Safety Act explains the Congressional intent in this regard:

> "This language is to assure that the tort liability of any person existing under common-law or statute will not be relieved by reason of this legislation or compliance with its provisions."

1968 U.S. Code Cong. & Ad. News 3223, 3239. In clear contrast the Congress did not enact any similar savings clause in the Federal Railroad Safety Act of 1970.

The Solicitor General's brief severely underplays the overwhelming desire of Congress during the 1970's to remove from the existing problems of the interstate rail industry the possibility of haphazard, non-uniform action by state agencies or courts designed to require or encourage railroad safety practices not mandated by Federal safety regulations, unless such state regulation was to eliminate an essentially local hazard and also did not burden interstate commerce. There are 218 pages of detailed safety regulations and standards involving every phase of railroad operations that have been enacted under the Federal Railroad Safety Act of 1970. 49 C.F.R. §§ 200-240. Five hundred and two pages of regulations have been enacted pertaining to transportation of hazardous materials. 49 C.F.R. §§ 174, 178-179. No person in this case has ever pointed to a state railroad safety standard or practice that concerns a subject not covered by the above Federal regulations or that was even violated by the Petitioner, Trustee of the property of the Chicago, Rock Island and Pacific Railroad Company. Nor has any person pointed to a state standard or practice designed to eliminate an essentially local hazard that is involved in this case or that the Petitioner Trustee violated.

2. Instead, the Iowa Supreme Court Rule imposing upon an interstate rail carrier state tort liability without fault has been rationalized as advantageous because it is expected to coerce rail carriers to develop some unspecified additional "safety technology". At page 4 of his brief, the Solicitor General quotes the Iowa Supreme Court's explanation of the regulatory effect of the Rule it had fashioned. (Pet. App. A 15):

> "Furthermore, the carrier is in a superior position to develop safety technology to prevent such accidents, and assessment of accident costs is one means of inducing such developments..."

This quote evidences action by several Iowa judges inexperienced in railroading that is designed to extract expenditure of scarce railroad industry resources to develop undefined safety practices for use in the State of Iowa and that are not mandated by federal regulations. One might ask, what "safety technology"? Must trains slow to 10 mph on main lines after entering and before leaving Iowa? Why should Iowa be permitted to induce the use in Iowa additional but undefined safety practices not shown to be designed to eliminate an essentially local safety hazard, not mandated by the Federal government for use in Minnesota or Missouri, and not required by Minnesota or Missouri to be used in those states?[1]

The Solicitor General's brief is logically inconsistent because at page 4 it sets out the Iowa Supreme Court's no fault liability rationale as including the regulatory effect on railroad safety that such a no-fault rule accomplishes, but at page 7, the brief approves preemption of punitive damages because of their regulatory effect on nuclear safety:

> "Since punitive damages do not compensate victims for damages suffered, they can only be understood as a means of inducing licensees to protect against future accidents. The award of such damages is thus inconsistent with the regulatory system—enforced by criminal and civil penalties—created by the Atomic Energy Act. 42 U.S.C. (Supp.V) 2271-2284."

Brief of the Solicitor General, page 7.

An important purpose and effect of the no-fault liability rule is to regulate rail safety with absolutely no showing that the

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[1] The Trustee would not have been liable without fault under state law if the propane had exploded in Minnesota, *Caril* v. *City of St. Paul*, 268 N.W.2d 908 (Minn. 1978), or in Missouri, *Pecan Shoppe etc.* v. *Tri-State Motor Transit Co.*, 573 S.W.2d 431 (Mo. App. 1978).

regulation falls within the narrow avenues carved out under the Federal Railroad Safety Act of 1970 or the Hazardous Materials Transportation Act.

3. The brief of the Solicitor General blurs the distinction between a "right" and a "remedy". The Federal Railroad Safety Act of 1970 and the Hazardous Materials Transportation Act do not preempt the remedy of civil damages. That has never been an issue. Civil damages are a remedy for property damage such as that sustained by Respondent if caused by violation of a Federal safety regulation or standard or violation of a state safety regulation or standard falling within the narrow permissible exceptions contained in the Federal Acts. The fact that a Federal regulatory statute permits additional common law remedies, such as damages, is separate from the effect of the act in preempting state law on the question of determining when a litigant has the right to any remedy, whether it be a federal remedy or a state law remedy. *Chelentis* v. *Luckenbach, S.S.Co.*, 247 U.S. 372, 382-384, 62 L.Ed. 1171, 1176-1177, 38 S.Ct. 501 (1917).

CONCLUSION

The avowed purpose and the actual effect of the Iowa Supreme Court's no-fault liability rule is to regulate safety practices and safety development programs of rail carriers in interstate commerce. This form of state regulation falls outside the statutory exceptions of the Federal Railroad Safety Act of 1970 and the Hazardous Materials Transportation Act, and attempts to single out Iowa for receipt of special safety practices.[2] This form of state regulation of railroad safety is not permitted under the Federal Railroad Safety Act of 1970 and the Hazardous Materials Transportation Act.

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[2] The price of extra "safety technology" in Iowa will be paid to a large extent by interstate rail shippers outside Iowa, or by shareholders and bondholders of bankrupt rail carriers that follow the path of the Rock Island.

Respectfully submitted,

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